IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 342 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE R.P.DHOLAKIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHAYLUBHAI CHIMANBHAI KUNKNA

Versus

STATE OF GUJARAT

Appearance:
MS BANNA S DUTTA for appellant
MR AJ DESAI, Addl. PP for the State.

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE R.P.DHOLAKIA

Date of decision: 15/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.P.DHOLAKIA)

The appellant - original accused of Sessions Case No. 15 of 1997 has filed the present appeal against the judgement and order dated 31st March, 1998 passed by the learned Additional Sessions Judge, Valsad at Navsari, convicting and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 200/-, in default to undergo simple imprisonment for one month, for the offence punishable under Section 302 of the Indian Penal Code. The complaint has been filed by the brother of the deceased on 27.6.1996 with the Vansda Police Station, which was registered at I. CR No. 74/96. It was alleged in the complaint by the complainant that the appellant during the night between 26th Sept. 1996 and 27th Sept. 1996, caused the death of his wife Jamniben by strangulation. Upon the said complaint, investigation was started and at the end of investigation, the Police has submitted charge-sheet against the accused.

2. The prosecution version is that during the night between 26.9.96 and 27.9.96, around 8.30 PM - 9.00 PM the present appellant and his wife - deceased Jamniben went to their hut which was very near to their family house wherein all family members including parents and brothers were staying and when in early morning at about 7.30 daughter of the deceased - namely, Ilaben entered the hut for the purpose of keeping drinking water pot, she saw that her mother was lying dead on the bed and her father was not there in the hut. Therefore, immediately she rushed to her family house and informed other family members regarding the same and thereafter, brother of deceased Jamniben had filed the complaint. After drawing the inquest panchnama - Ex.6 and panchnama of scene of offence Ex.8, the body of deceased Jamniben was sent by the Police to Primary Health Centre at Vansda for the purpose of performing post-mortem, wherein Dr. Patel, Medical Officer prepared the postmortem note Ex.20 and also issued death certificate Ex.21. The cause of death is reported to be asphyxia as a result of ligature (constriction) around neck. The Police also drew a panchnama of scene of offence in the presence of panchas and a note Ex.9 has been recovered.

3. The Police started search of the accused, but the accused was not available. However, on 12.11.1996, accused was arrested and produced before the concerned Judicial Magistrate for judicial custody and started further investigation in the case and at the end of investigation, filed a charge-sheet pointing appellant as the accused for the offence punishable under Section 302

of the Indian Penal Code and it being an offence which is triable by the Sessions Court, it was committed to the learned Sessions Judge, Valsad at Navsari and on receiving the same, it has been registered as Sessions Case No.15 of 1997 and sent to the Court of learned Additional Sessions Judge. The learned Additional Sessions Judge, framed charge Ex. 2, wherein he has denied the charge and prayed for trial and therefore, to prove the guilt against the accused, prosecution has examined various witnesses and also produced voluminous documentary evidence. The prosecution has examined the panchas and the daughters of the accused namely Ilaben P.W No. 3 and Anitaben P.W No. 5, and also Dr. Patel who has performed the postmortem of deceased Jamniben, and witness Sarpanch Devjibhai Nosirbhai Chaudhari P.W No.7, and thereafter further statement of accused under Section 313 of the Cr.P.C was recorded. After hearing was given to the respective parties, the learned Additional Sessions Judge convicted the accused for the offence punishable under Section 302 of the Indian Penal Code and sentenced as stated above, against which the present appeal has been preferred by the appellant.

4. Before proceeding further, it may be stated that previously this appeal was listed for admission before another bench of this Court who after hearing the learned Counsel for the accused appellant and after perusing the R & P, by order dated 20.7.1998, summarily dismissed the appeal and against that the appellant preferred a Criminal Appeal before the Hon'ble Supreme Court, being Criminal Appeal No. 1051 of 2000. The apex Court granted leave and set aside the order dated 20.7.1998, with a direction to do well in disposing of the present appeal within a period of three months. Accordingly, this matter is revived and taken up for hearing.

5. We have heard the learned Counsel for the respective parties.

6. Learned Counsel for the appellant mainly argued that it is a case of circumstantial evidence wherein chain of circumstantial evidence has not been proved and therefore, appellant is required to be acquitted only on that ground. She also argued that doctor who had performed the post-mortem of the deceased has specifically opined that the injury in question could not be inflicted by way of Muddamal article No.4 and therefore, prosecution has failed to establish the link connecting the accused with the crime. She has also argued that two important witnesses namely Ilaben and Anitaben who are the daughters of the deceased have not

supported the say of the prosecution and therefore theory of last seen together is not established. She has also argued that Notes Ex.9 and 10 have not been properly proved and therefore, it should not have been taken as an evidence against the accused.

7. The learned Additional Public Prosecutor has argued that such case of strong circumstances which has been proved by the prosecution beyond any reasonable doubt, cannot be ignored. Relying upon the evidence of Dr.Patel, daughters of the deceased and also from the evidence of Sarpanch Devjibhai P.W.No.7, and Note Ex.9, he has argued that both the important witnesses have supported the say of the prosecution that lastly deceased was found in the company of accused and on the previous night both have left for going towards the hut after taking meals and early in the morning of 27.9.1996 when their daughter Ilaben had gone there to keep water, she had seen that her mother was dead and father had gone away and he was absconding for about two months. He has also argued that the appellant accused has not explained his absence for a period of two months and no satisfactory explanation has been put forward by the appellant accused for remaining away from the village for about 2 months, which is also one of the strongest circumstances to hold the accused guilty for the offence. He has also argued that Note Ex.9 has been duly proved by the prosecution by way of oral evidence of Ilaben P.W 3 Ex.15 and Sarpanch Devjibhai P.W 7 Ex.22. Witness Devjibhai has categorically deposed in his oral evidence that the appellant accused was one of the Members of Panchayat wherein he was a Sarpanch and therefore he knows the hand-writing of the appellant accused and after seeing Ex.9 and 10, he has categorically deposed that it is in the hand-writing of appellant accused. He has also drawn our attention towards paragraphs Nos. 12, 13, 15 and 18 of the judgement of the learned Additional Sessions Judge and argued that it is a well reasoned judgement wherein the learned Additional Sessions Judge has discussed the above aspect of the matter at length and prosecution has proved the case against the appellant beyond reasonable doubt and therefore the appeal is required to be dismissed.

8. We have carefully gone through the original records and proceedings. We have also gone through the oral evidences which have been shown to us by the learned Counsel for the respective parties, more particularly the inquest panchnama Ex.6, Note Ex. 9 and 10 and deposition of Dhirubhai Sukkarbhai P.W 1 Ex.7. The prosecution has proved that dead-body of the deceased was lying in the

hut itself and it has also been able to establish that muddamal article No.1 and 2 has been seized from the hut itself by panchnama Ex.11. For the purpose of proving the last seen together, the prosecution has mainly relied upon the oral evidence of daughter of the appellant and deceased Ilaben who is P.W No.3, wherein she has categorically deposed that in the night between 26th Sept.96 and 27th Sept.96 after taking meals her father and mother both went to the hut, which was very near to their family house and when she went their early in the morning on 27th Sept.96 for the purpose of keeping water, she found her mother lying dead in the hut and her father was not there and therefore she has informed the other family members including her uncle and grand parents. She has also admitted that Police has seized muddamal article No.2 note from the hut. She has also admitted the hand-writing of the note Ex. 9 and 10 by categorically stating that it is in the handwriting of her father. She has also admitted that the same has been seized by the Police by way of muddamal article Nos.2 and 3 and nothing has been come out in the cross-examination to shake the prosecution. Thus, the prosecution has been able to establish last seen together.

Secondly, one of the important evidence which goes against the appellant accused is that he was not available at his residence from 27th Sept. 1996 onwards till he was arrested on 12.11.1996, which means that he was absconding for a period of almost 45 days and even he has chosen not to remain present in the last rites of the deceased who was none else but his wife and no satisfactory explanation has been put forward by the accused even in his further statement.

Thirdly, the most convincing circumstantial evidence which goes against the appellant accused is the medical evidence, for which the prosecution has examined Dr. Patel and as per his evidence, on 27.9.1996 he was serving as a medical officer at Primary Health Centre at Ankarash and he received the dead body of the deceased Jamniben at 15.30 hours for the purpose of conducting post-mortem examination. He has further deposed that he started the post-mortem examination at 4.00 P.M and concluded by 5.30 P.M. He has categorically deposed in his evidence that deceased died as a result of strangulation. He proved post-mortem note at Ex.21, wherein he has opined the cause of death was due to asphyxia as a result of ligature (constriction) around neck. He ruled out the possibility of suicidal death for which he has categorically deposed in his evidence at paragraph 6 that the injury which has been occurred shows

that it is not a case of suicide. The arguments advanced by the learned Counsel for the appellant by drawing our attention towards paragraph 5 of oral evidence of Dr. Patel that the injury in question could not have been possible by muddamal article No.4, cannot be accepted because it is not in dispute that doctor has specifically opined the cause of death as strangulation and ligature mark was seen around neck of the deceased. It is established from the record and proceedings that the muddamal article No.4 has been voluntarily produced by the accused appellant after his arrest i.e. after a period of about 45 days from the date of the incident. At the most one can come to the conclusion that he has tried to misguide the investigating officer at initial stage by producing muddamal article No.4 as muddamal which has been allegedly used by him, but no adverse inference can be drawn or no benefit should be given to the appellant accused as to his own wrong. However, fact remains that the deceased died as a result of strangulation and prosecution has been able to prove the theory that appellant accused was last seen together and accused has not putforth any satisfactory explanation as to what happened to the deceased and secondly, prosecution has also been able to prove the note Ex.9 and accounts book Ex.10, for which the prosecution has relied upon the oral evidence of daughters of the appellant and deceased, wherein they have categorically admitted that the hand-writing of Ex.9 and 10 was of the appellant. Moreover, to prove the same, prosecution has also examined Sarpanch of the village Devjibhai P.W. 7, who has deposed that the appellant was a member of the Panchayat, wherein he was Sarpanch at the relevant time and therefore he knows the hand-writing of the appellant and he has categorically deposed that the hand-writing of Ex.9 and 10 is of the appellant accused. Therefore, this is one more circumstance which goes against the appellant accused. So in short, the prosecution has successfully been able to prove the case against the appellant beyond any reasonable doubt by adducing oral and documentary evidence and strong circumstantial evidence namely last seen together, the conduct of the accused by not even remaining present at the last rites of the deceased wife and absconding for about 45 days and by way of confirmation Ex.9 and note Ex.9 has been proved by the prosecution stating that it is in the hand-writing of the appellant accused, wherein he has admitted the guilt.

10. Keeping in mind over-all circumstances and after going through the oral and documentary evidence which has been shown by the learned Counsel for the respective parties, we are of the opinion that the prosecution has

proved beyond any reasonable doubt the guilt of the accused appellant and the learned Additional Sessions Judge has discussed the above evidence at paragraphs 12, 13, 15 and 18 and passed a reasoned judgement thereby convicting the appellant accused under Section 302 of the Indian Penal Code by awarding life imprisonment and we do not find any substance in the appeal.

In the result the appeal fails and is dismissed.

---

*/Mohandas